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No. 03-1343

Supreme Court, U.S.
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In The

Supreme Court of the United States

KEITH JOHNSON,

Petitioner,

vs.

ORANGE COUNTY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ORANGE COUNTY FAILED TO ADDRESS MATERIAL PORTIONS OF THE RECORD WHICH ESTABLISH THAT THE ISSUE, "PROMPT JUDICIAL REVIEW," WAS PRESENTED ON THE MERITS

The property in dispute has been owned by Keith Johnson and used for "adult entertainment" purposes for many years. Ever since Orange County refused to reissue Mr. Johnson licenses for his properties, he has been divested of an important right and has been unable to use his property as originally contemplated. The injury is manifest and deep not only because of the First Amendment rights at stake, but because the property was purchased for three million dollars – a value linked to the properties' use as an adult entertainment venue.[1] Therefore, Mr. Johnson's claim of injury based upon the failure to be provided prompt judicial review is not fanciful or imaginary – it could not be more real.

As reflected in the appendix to Johnson's petition, Orange County's adult entertainment code fails to provide prompt judicial review. Further, as reflected by Johnson's Appendix C, this issue was extensively briefed before the trial judge.

During the hearing before the trial judge, this attorney was under the impression that the basis for the judge's order dismissing the case and the only issue to be appealed was whether Johnson agreed to relinquish the

[1] There are actually four adult business locations at the property purchased by Johnson for three million dollars. Only two of them are the subject of this action.

licenses in a parallel misdemeanor proceeding. However, that issue is distinct from the constitutionality of Orange County's adult entertainment code. Obviously, if Orange County's code is unconstitutional, it is unenforceable. *Norton v. Shelby County*, 118 US 425, 442 (1886) [inoperative as if it had never been passed].

Initially this attorney was of the opinion that the "criminal case" issue was the only basis for Judge Sprinkel's dismissal, as reflected by the quotes from the transcript in Orange County's response. Orange County's true intent became clear later. What occurred was that Orange County prepared the order for the trial judge's signature. This attorney approved the form of the order. The last sentence of the order provides that Mr. Johnson had "[n]o right to the relief requested." See Mr. Johnson's Petition Appendix B at 5a.

In gamesmanship fashion and in its plea for affirmance, Orange County argued to the state District Court of Appeal that all of Johnson's requested relief had been denied on the merits, including his claim of prompt judicial review. Consider the following statements contained in Orange County's appellate brief.

> Nevertheless, in the event that the constitutional issues were still properly preserved and pending before the trial court, **the final judgment encompassed all of the pending issues and properly rejected Johnson's request for relief.**
>
> In the amended complaint, Johnson raised two constitutional issues. First, Johnson claimed that the licensing provisions failed to provide prompt judicial review. Second, Johnson claimed

> that the nonconforming use provision was unconstitutional. Either the trial court determined that Johnson did not have standing to assert those constitutional challenges, or the trial court upheld the constitutionality of the provisions at issue.

See County's Answer Brief, District Court at p. 17.

Further, in addition to the above statements, Orange County briefed the issue on the merits in its argument section of its answer brief. This portion of Orange County's brief is being filed with this court as a supplemental appendix. See Appendix A.

Although Johnson raised this point in his petition, Orange County failed to address same in its response. It is unfair and duplicitous for Orange County to play "gotcha" with both the trial and state appellate courts, and then turn 180 degrees and argue before this Court that the issue was not decided or presented to the appellate court on the merits. That is patently wrong.[2]

Because this issue was litigated on the merits before the trial and the appellate courts and was affirmed by the appellate court, it is appropriate for review here.

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[2] Likewise, Orange County argued in *Clayton Hospitality*, that the "prompt review" argument was not preserved for appeal. See *Clayton Hospitality v. Orange County*, SCUS Case Number 03-201.

CONCLUSION

Based upon the foregoing, Johnson requests that this Court grant his petition.

Respectfully submitted this 3rd day of May, 2004.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT

KEITH JOHNSON

Appellant,

v. DCA Case No. 5D03-719

COUNTY OF ORANGE, and EARL K. WOOD, as Orange County Tax Collector, Lower Ct. Case No. CI99-4179

Appellees. /

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ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA
THE HONORABLE GEORGE A. SPRINKEL, IV

****

ANSWER BRIEF SUBMITTED BY APPELLEES ORANGE COUNTY AND EARL K. WOOD AS ORANGE COUNTY TAX COLLECTOR

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* * *

Dade County, 766 So. 2d 1080 (Fla. 3d DCA 2000) (holding that Plaintiff lacked standing to challenge the constitutionality of an ordinance because Plaintiff would not benefit from a finding that it was unconstitutional).

Nevertheless, in the event that it is determined that Johnson had standing, the challenged provisions are clearly constitutional both "facially" and "as applied" as discussed below.

2. The Licensing Provision is Constitutional Both "Facially" and "As Applied."

In the *Amended Complaint*, Johnson challenged the constitutionality of the licensing provision claiming that the provision failed to provide for prompt judicial review. The *Orange County Adult Entertainment Code* has imposed no administrative roadblocks and expressly allows immediate access to the courts for a challenge. Section 3-10 provided:

> Any decision of the tax collector pursuant to article II of this chapter, or any failure of the tax collector to render a decision in accordance with the outermost time requirements of article II of this chapter, **may be immediately reviewed** as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party.

Appendix, Tab 5A, *Orange County Code* § 3-10 (emphasis added).

Courts have held that "access to prompt judicial *review* [as opposed to judicial *resolution*] is sufficient for adult entertainment licensing ordinances." *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th

Cir. 1999) (emphasis added);[5] *Clayton Hospitality Group, Inc. v. Orange County, Florida, and Earl K. Wood, as Orange County Tax Collector*, 16 F.L.W. Fed. D200 (M.D. Fla. 2002), *aff'd*, Case No. 02-14738 (11th Cir. May 12, 2003) (affirming the constitutionality of the license transfer provision in the Orange County Adult Entertainment Code).

Further, courts have repeatedly upheld the constitutionality of the licensing provisions in *Orange County Adult Entertainment Code*, including the issue of whether the *Adult Entertainment Code* provides for prompt judicial review. *See, U.S. Nineteen, Inc. v. Orange County, Florida, and Earl K. Wood, Tax Collector for Orange County, Florida*, 8 F.L.W. Supp 236 (Fla. 9th Jud. Cir. 2001); *Florida Video XPress, Inc. v. Orange County, Florida*, 983 F. Supp. 1091 (M.D. Fla. 1997) (holding that the Orange County Adult Code provides for prompt judicial review within the meaning of *Freedman, FW/PBS, and Redner*); *State v. Williams*, 4 F.L.W. Supp. 678 (Fla. Orange County Court Ct. 1997).

* * *

[5] *See also, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990).